

functions.” Michigan Order ¶ 133, it is essential that the necessary wholesale support processes be in place, available on a non-discriminatory basis, and scalable to meet reasonably foreseeable future demand

BellSouth places great weight upon the findings of the LPSC that its OSS satisfy the checklist. We find the LPSC’s determination to be unpersuasive for several reasons. First, the LPSC’s determination was not based upon the Commission’s approach for assessing checklist compliance.<sup>29</sup> Second, the LPSC did not articulate the analysis it performed in assessing OSS compliance, so that it is difficult to ascertain the basis for its conclusion on OSS or its reasons for rejecting the recommended decision of the Chief Administrative Law Judge (ALJ) that did discuss OSS issues at length and found significant deficiencies.<sup>30</sup> Third, it appears that the LPSC’s

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<sup>29</sup> During its open session the day after the Michigan Order was released, just before reaching its decision on the SGAT, the LPSC rejected a motion by Commissioner Field to ask BellSouth for an additional sixty days to review the SGAT to, inter alia, “allow [the LPSC] to analyze fully the implications of the [Michigan Order] for BellSouth’s SGAT.” Partial Minutes of August 20, 1997, Open Session of the LPSC Held in Baton Rouge, Louisiana, at 2-4 (“LPSC Partial Minutes”), attached to BellSouth Louisiana Brief as App. C-1, Vol. 13, Tab 135. Instead, the LPSC proceeded to immediately approve the SGAT

<sup>30</sup> Recommendation, Docket No. U-22252, at 24-27 (Aug. 14, 1997) (“ALJ Recommendation”), attached to BellSouth Louisiana Brief as App. C-1, Vol. 13, Tab 131. The LPSC staff also recommended against finding compliance on OSS. LPSC Staff 271 Recommendation, Docket No. U-22252, at 3 (Aug. 15, 1997) (“LPSC Staff Recommendation”), attached to BellSouth Louisiana Brief as App. C-1, Vol. 13, Tab 133). After observing that the issue was “hotly contested” and that the LPSC had conducted a technical conference and propounded 115 data requests, the LPSC simply stated: “Following careful consideration and analysis, the Commission concludes that the Operations Support Systems do in fact work and operate to allow potential competitors full non-discriminatory access to the BellSouth system.” Louisiana Public Service Commission Order, Docket No. U-22252, Order U-22252-A, at 15 (rel. Sept. 5, 1997).

recommendation was premised, at least in large part, on a technical demonstration held on August 13<sup>31</sup> as opposed to a more thorough assessment of performance parity and operational readiness through internal testing evidence, carrier-to-carrier testing, and performance indicators reflective of actual use. Finally, BellSouth's OSS are operated on a regional, rather than a state-by-state, basis, and other state commissions in BellSouth's region have concluded that the same systems approved by the LPSC were insufficient.<sup>32</sup>

Putting aside BellSouth's legal arguments and efforts to explain away the concerns articulated in the Department's South Carolina filing, it remains clear that BellSouth has failed to satisfy the Department's three essential requirements for an acceptable wholesale support system, as we made clear in our South Carolina Evaluation and reaffirm here.<sup>33</sup> First, BellSouth has not instituted *performance measures* that will enable it to demonstrate -- through objective criteria -- that it can provide wholesale performance at parity with its own retail performance where such a comparison can be made, and a meaningful opportunity to compete, where no retail counterpart is available. As we have stressed, proper performance measurement is an essential aspect of

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<sup>31</sup> The LPSC comments and the record of the state proceeding suggest that the majority of the commissioners based their decision on this short technical demonstration. See Comments of the Louisiana Public Service Commission, CC Docket No. 97-231, at 2, 28 (Nov. 24, 1997); see also LPSC Partial Minutes at 2, 4-5, 7-8.

<sup>32</sup> The Florida Public Service Commission, for example, recently issued an order rejecting BellSouth's SGAT, finding that BellSouth OSS do not meet the statutory requirements and highlighting many concerns similar to those that we identified in our evaluation of BellSouth's South Carolina application. Florida PSC Order

<sup>33</sup> DOJ South Carolina Evaluation at 25-31, BellSouth South Carolina App. A.

providing effective support systems, and although BellSouth has taken important steps in this regard, it has yet to institute the necessary range of measures to demonstrate that it has provided satisfactory support processes.<sup>34</sup> Second, as explained in our South Carolina filing, BellSouth has failed to implement support systems that provide CLECs with *access to the basic functionalities at parity with its own systems*. BellSouth has attempted to explain away a number of the Department's concerns, but, in the short period of time since its initial filing, it has failed to make the changes necessary to provide such access.<sup>35</sup> Finally, the Department remains unconvinced that the important BellSouth systems have been "*stress tested*" to establish their operational readiness -- i.e., that the systems can be relied on when used at foreseeable levels of demand.

### **III. The Louisiana Market Is Not Fully and Irreversibly Open to Competition**

The 1996 Act requires the Commission to consult with the Attorney General on all applications under section 271, and authorizes the Attorney General to provide an evaluation of such applications "using any standard the Attorney General considers appropriate."<sup>36</sup> The 1996 Act does not limit the Department's evaluation to any of the specific findings that the Commission is required to make, under section 271(d)(3), before approving an application. Indeed, it does not

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<sup>34</sup> Affidavit of Michael J. Friduss on Behalf of the U. S. Department of Justice ¶¶ 18-24, 45-73 ("Friduss South Carolina Aff"), attached to this Evaluation as Ex. 3.

<sup>35</sup> For example, flow-through continues to be a major problem, with extremely low rates compared to BellSouth's retail performance. See Affidavit of William N. Stacy, Checklist Compliance (Operations Support Systems) Ex. WNS-41, attached to BellSouth Louisiana Brief as App. A, Vol. 4a, Tab 12.

<sup>36</sup> 47 U.S.C. § 271(d)(2)(A).

limit the evaluation to those findings, collectively, though of course the evaluation may be relevant to any or all of those findings. In any event, the Commission is required to accord "substantial weight" to the Department's evaluation. 47 U.S.C. § 271(d)(2)(A).

As we have explained previously, significant commercial entry can give rise to the inference that a market has been opened to competition.<sup>37</sup> At this time, however, BellSouth faces no significant competition in local exchange services in Louisiana.<sup>38</sup> Thus, despite the apparent interest in entering Louisiana by a significant number of competitors, there is no reason to presume that the market is fully and irreversibly open to competition. Therefore, we must examine competitive conditions more carefully to see whether any significant barriers continue to impede the growth of competition in Louisiana.

**A. BellSouth Has Not Demonstrated That All of Its Current or Future Prices for Unbundled Elements and Resale of Certain Retail Services Will Permit Efficient Entry or Effective Competition**

**1. Pricing of Unbundled Elements**

Competition through the use of unbundled network elements will be seriously constrained, and may even be impossible, if those elements are not available at appropriate prices. In evaluating pricing arrangements as part of its competitive assessment, the Department will ask whether a BOC has demonstrated that its current prices are, and future prices will be, supported by a reasoned application of a procompetitive pricing methodology.

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<sup>37</sup> See DOJ Oklahoma Evaluation at 43-44; DOJ Michigan Evaluation at 30.

<sup>38</sup> The competitive situation in Louisiana is reviewed in more detail in Appendix B to this Evaluation.

In our South Carolina filing, we explained that a procompetitive pricing methodology is a necessary precondition to a fully and irreversibly opened local market.<sup>39</sup> Our evaluation of a state's wholesale pricing structure does not require any particular methodology, but rather, insists on a reasoned application of a pro-competitive one. We expect that in most cases, a BOC will be able to demonstrate this by relying on a reasoned pricing decision by a state commission. However, if a state commission has not explained its critical decisions, or has explained them in terms that are inconsistent with procompetitive pricing principles, the Department will require further evidence that prices are consistent with its open-market standard.

In Louisiana, BellSouth's pricing for unbundled elements is in most respects consistent with the Department's focus on pro-competitive pricing principles. Significantly, BellSouth's permanent prices for interconnection, unbundled elements and transport and termination, recently approved by the LPSC, were developed from a study by the LPSC's staff consultant according to the TSLRIC/LRIC ratemaking requirements that the LPSC adopted after the Telecommunications Act was passed, as well as the TSLRIC principles of the Michigan PSC.<sup>40</sup> The Department is

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<sup>39</sup> DOJ South Carolina Evaluation at 35-40

<sup>40</sup> Louisiana Public Service Commission, In re: Regulations for Competition in the Local Telecommunications Market, Amendments as Adopted 3/19/97 to Sections 901, 1001, and 1101 of the Regulations for Competition in the Local Telecommunications Market General Order Dated March 15, 1996 (as amended 10/16/96), at § 901.C & n.1, § 1001.E (Mar. 19, 1997), attached to BellSouth Louisiana Brief as App. C, Tab 186, App. "A." The Department understands the language in the LPSC's rules to the effect that "[t]here is no mandate that unbundled elements be provided by the ILEC to TSPs at its TSLRIC or LRIC of providing such elements," *id.* § 1001.E, to permit negotiation of rates on other bases, not as authorization for the LPSC itself to depart from the forward-looking pricing principles that it directed ILECs to use in providing cost studies to the LPSC, which would be used in conducting arbitrations or reviewing

satisfied that this methodology embodies the basic concepts of forward-looking cost-based pricing, and is consistent with the Department's competitive standard

Despite the pro-competitive methodology adopted by the LPSC, the lack of any plan for a geographic deaveraging of local loop prices over time or any adequate showing of cost-based prices for collocation preclude us from determining that the pricing structure in Louisiana will facilitate efficient and effective competitive entry. In another area -- the pricing of vertical features associated with unbundled switching -- we are not satisfied on the current record that BellSouth's pricing is consistent with our open-market standard, but we do not preclude the possibility that BellSouth might be able to justify its pricing under that standard with additional evidence.

Geographic Deaveraging. As we noted in our South Carolina filing, we would expect the cost of unbundled network elements -- particularly, local loops -- to vary across different geographic areas within the state, and thus, would expect states to adopt some mechanism for geographically deaveraging prices, now or in the future.<sup>41</sup> The LPSC, however, has not offered any justification for refusing to adopt geographically deaveraged prices. Various potential local competitors advocated geographic deaveraging of unbundled elements,<sup>42</sup> while both BellSouth

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SGATs to establish rates under section 252 of the 1996 Act.

<sup>41</sup> DOJ South Carolina Evaluation, at 41 n.54

<sup>42</sup> See, e.g., Louisiana Public Service Commission, Docket Nos. U-22022/U-22093, Post Hearing Brief of MCI Telecommunications Corp. at 10 (Sept. 29, 1997), attached to BellSouth Louisiana Brief as App. C-3, Vol. 34, Tab 276; Louisiana Public Service Commission, Docket Nos. U-22022/U-22093, AT&T Communications of the South Central States, Inc.'s Post-Hearing

and the LPSC's staff consultant proposed averaged statewide rates.<sup>43</sup> Because the LPSC's ALJ concluded that geographic deaveraging was necessary for an accurate cost determination, she recommended that the LPSC reject the use of statewide averaged rates and adopt instead geographic deaveraging based on broad "density" zones, proposing that the LPSC reserve a final decision on an appropriate method of geographic deaveraging while continuing to use statewide averaged rates on an interim basis.<sup>44</sup> The LPSC failed to adopt any phased-in program of geographic deaveraging -- without any analysis or explanation -- in favor of a permanent statewide averaged UNE rate structure.<sup>45</sup>

The lack of any plan for geographic deaveraging, particularly in loop prices, will have a significant effect on local entry in Louisiana using unbundled elements, and could affect the

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Brief, at 4-5 & n.5 (Sept. 29, 1997), attached to BellSouth Louisiana Brief as App. C-3, Vol. 34, Tab 281.

<sup>43</sup> See Louisiana Public Service Commission, Docket Nos. U-22022/U-22093, Hearing Transcript at 3091 (Sept. 24, 1997) ("Dismukes Testimony"), attached to BellSouth Louisiana Brief as App. C-3, Vol. 34, Tab 273 (no analysis by staff consultant of rate deaveraging); Complete Transcript of October 22, 1997 Open Session of the Louisiana Public Service Commission at 85-86 ("Tr. of LPSC Oct. 22, 1997 Open Session"), attached to BellSouth Louisiana Brief as App. D, Tab 2 (LPSC staff opposed to any geographic deaveraging of wholesale rates before geographic deaveraging of retail rates and a universal service fund proceeding)

<sup>44</sup> Louisiana Public Service Commission, Docket Nos. U-22093/U-22022, Final Recommendation, at 26, 58 (Oct. 17, 1997) ("Louisiana ALJ Pricing Recommendation"), attached to BellSouth Louisiana Brief as App. C-3, Vol. 34, Tab 284.

<sup>45</sup> Louisiana Public Service Commission, Docket Nos. U-22093/U-22022, Order No. U-22022/22093-A, at 4-5 (Oct. 24, 1997) ("Louisiana Final Pricing Order"), attached to BellSouth Louisiana Brief as App. C-3, Vol. 34, Tab 285

viability of such competition for some types of customers. Experience from all other states that have established deaveraged prices, as well as from general nationwide studies, indicates that there are considerable variations in loop costs between urban and rural areas, and there is certainly no evidence in this record that would suggest otherwise for Louisiana.<sup>46</sup> BellSouth has not argued that there are no differences in loop costs across geographic areas, but has defended the lack of deaveraging on the ground that deaveraging would increase the incentives of competitors to focus their offerings on more densely populated areas.<sup>47</sup>

As the 1996 Act makes quite clear, there must be a transition to an efficient, sustainable, and equitable competitive environment, whereby unbundled element prices will eventually be *geographically deaveraged to reflect differences in costs*, and subsidies to support universal service will be provided explicitly and in a competitively-neutral manner. To be sure, this transition will require the reform of universal service support, as called for by section 254(f) of the 1996 Act, to replace the implicit subsidization in present retail rates for local service and to permit appropriate adjustments to a state's rate structure.<sup>48</sup> Thus, while we do not believe that

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<sup>46</sup> According to MCI, the deaveraged loop rate for the most densely populated areas in Louisiana would decrease from \$19.35 to \$10.12. Comments of MCI Telecommunications Corporation, CC Docket No. 97-231, at 56 (Nov. 25, 1997).

<sup>47</sup> Louisiana Public Service Commission, Docket Nos. U-22022/U-22093, Post Hearing Brief of BellSouth Telecommunications, Inc., at 51-52 (Sept. 29, 1997), attached to BellSouth Louisiana Brief as App.C-3, Vol. 34, Tab 274.

<sup>48</sup> In discussing a transitional approach for geographic de-averaging, we do not suggest that states need or should wait to establish deaveraged rates for unbundled elements. Indeed, many have done so already.



geographic deaveraging must necessarily take place immediately, before section 271 authority can be granted, it must at least be clear that it will be accomplished over some transition period. However, when there has been no measure of geographic deaveraging of loop prices, and there is no reasonable transition plan to implement such deaveraging in the future, we cannot conclude that a market is or will be open to efficient competition using unbundled elements.

Collocation. BellSouth offers no prices at all in Louisiana for one of the significant components of physical collocation -- space preparation -- leaving the determination of such prices to negotiation on a case-by-case basis. For other components, such as space construction, BellSouth also intends to impose charges that have not been adequately demonstrated to be cost-based.<sup>49</sup> Because physical collocation is an important component of providing interconnection and access to unbundled network elements under section 251(c)(6), the absence of reasonable and predictable prices for collocation threatens to act as a formidable barrier to entry.

The LPSC's ALJ concluded that BellSouth's rates for collocation should be subject to the same forward-looking cost standards applicable to pricing of interconnection and unbundled network elements generally, and proposed to use a collocation cost model offered by potential competitors.<sup>50</sup> The LPSC's staff consultant did not reject this model, but simply stated that she did not have time to analyze it, and therefore used BellSouth's cost assumptions with limited

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<sup>49</sup> Louisiana Final Pricing Order Attach. A at 6

<sup>50</sup> Louisiana ALJ Pricing Recommendation at 52-55, 64-65.

modifications of the final prices for other across-the-board corrections.<sup>51</sup> The LPSC, however, did not discuss collocation at all in its final pricing decision, but simply rejected the ALJ's recommendations and allowed BellSouth's handling of physical collocation space preparation on an individual case basis, as well as its proposed construction and other charges, to stand.<sup>52</sup>

Although we understand that there may be instances in which it would be justifiable to postpone addressing certain issues, as a rule we believe that it is far preferable for a BOC to have prices and other relevant terms of service in place when it applies, rather than to defer the establishment of such terms for future negotiations following its interLATA entry, when its incentives to delay local competitive entry would be heightened. On the current record, BellSouth has not shown that it could not provide greater specificity in advance as to how it will charge for physical collocation space. Because its failure to commit itself to certain pricing principles raises significant competitive concerns -- i.e., raising the possibility of unreasonable prices and drawn out negotiations that have the effect of precluding competitive entry -- we cannot conclude that the pricing structure for collocation will permit efficient entry so as to fully and irreversibly open the local market.<sup>53</sup>

Vertical Switching Features. The issue of pricing for vertical switching features received considerable attention from both the consultant and the ALJ. However, BellSouth's study on this

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<sup>51</sup> Dismukes Testimony at 3119-3120.

<sup>52</sup> Louisiana Final Pricing Order Attach. A at 6.

<sup>53</sup> See, e.g., DOJ Oklahoma Evaluation at 31-34.

issue was submitted at a late stage in the state pricing docket, as BellSouth had initially resisted providing vertical features as unbundled elements. The consultant rejected some of BellSouth's cost assumptions, but still priced vertical switching features as a separate element in addition to the switch port charge of \$2.20, recommending a charge of \$8.28 for all vertical features that was approved by the LPSC.<sup>54</sup> Our concern with the pricing of vertical services does not go merely to whether a charge for vertical features should be imposed separately or bundled with the switch port charge, but also to the costs associated with purchasing them. The ALJ proposed not to adopt any permanent rate for vertical switching features, but to conduct further proceedings on this issue, in light of the limited opportunity the consultant had to analyze BellSouth's cost data, while using the consultant's recommended rate on an interim basis.<sup>55</sup> The LPSC rejected this recommendation without explanation, adopting the recommended rate as permanent without conducting further proceedings.<sup>56</sup> In light of the ALJ's and the LPSC consultant's suggestions that this issue would have benefited from a greater opportunity for analysis and discovery, possibly leading to a significantly different recommendation, we question whether the LPSC's procompetitive pricing principles were applied in a reasoned fashion as to vertical services.<sup>57</sup>

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<sup>54</sup> LPSC Final Pricing Order at 4; Dismukes Testimony at 2867-69, 2885-87, 2913-17, 3054-74, 3111-17.

<sup>55</sup> Louisiana ALJ Pricing Recommendation at 52, 64.

<sup>56</sup> Louisiana Final Pricing Order at 4-5.

<sup>57</sup> See Tr. of LPSC Oct. 22, 1997 Open Session at 93-94 (comments of staff consultant Kimberly Dismukes). A number of other states, including ones in the BellSouth region, have rejected the concept of imposing a separate charge for vertical switching features and agreed that

## 2. Pricing of Resold Services at Wholesale

The 1996 Act requires that all retail services be made available for resale at a wholesale discount 47 U.S.C. § 251(c)(4). Specifically, it provides that states must set the wholesale discount based on an "avoided" cost methodology, using "retail rates charged to subscribers" and "excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by the local exchange carrier " 47 U.S.C. §252(d)(3). In assessing whether a procompetitive pricing structure is in place in a particular state, the Department will assess not only the pricing of UNEs, but also whether competitors have access to resold services at a procompetitive, i.e., "avoided cost" discount, and under reasonable terms and conditions.

In setting BellSouth's general resale discount in Louisiana at 20-72%, the state commission has commendably explained its methodology and application of the "avoided cost" concept, identified relevant issues posed by the determination of avoided costs, and shown how it

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the costs of most or all of these features are properly reflected as part of port charges in the range of \$2-3, a quarter of BellSouth's total price for a switch port and its vertical features in Louisiana. See, e.g., Georgia Public Service Commission, Transcript of Administrative Session, at 7, 11, 16, 19 (Oct. 21, 1997) (permanent rate of \$1.85 for switch port including vertical features); Florida Public Service Commission, In re: Petitions by AT&T, et al., for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996, Docket No. 960833-TP, Order No. PSC-96-1579-FOF-TP, Final Order on Arbitration at 15-16 and Attach. A (Dec. 31, 1996) (cost-based rate of \$2.00 for switch port including vertical features); New York Public Service Commission, Case No. 95-C-0657, 94-C-0095, 91 C-1174, Opinion No. 97-2, Opinion and Order Setting Rates for First Group of Network Elements, at Attach. D, Element Rates (Apr. 1, 1997) (including most listed vertical features in port charge of \$2.50).

applied its methodology based on BellSouth's cost data to arrive at the discount.<sup>58</sup> In so doing, the LPSC relied on a detailed independent analysis by its own staff consultant that distinguished wholesale from retail functions, reflecting the "opportunity to avoid" cost methodology rather than whether BellSouth chose to continue to incur retail costs.<sup>59</sup> The Department is satisfied that the process that the LPSC has followed to set this general discount, and the result it has reached, are consistent with the Department's competitive standard.<sup>60</sup>

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<sup>58</sup> Louisiana Public Service Commission, In re: Review and Consideration of BellSouth Telecommunication, Inc.'s Resale Cost Study, Docket No. U-22020, Order, at 9-16 (Nov. 12, 1996), attached to BellSouth Louisiana Brief as App. C-4, Vol. 38, Tab 329.

<sup>59</sup> The LPSC's approach to resale pricing, while not denominated as an "avoidable" cost methodology, appears to operate consistently with the Commission's underlying concern that "resellers should not be required to compensate a BOC for the cost of services, such as marketing, that resellers perform." Michigan Order ¶ 295.

<sup>60</sup> We do point out, however, that there is one area in which BellSouth's resale policies raise questions, restrictions on resale involving Contract Service Arrangements (CSAs), see Louisiana Public Service Commission, Regulations for Competition in the Local Telecommunications Market, § 1101.B.2 (as amended Mar. 19, 1997), attached to BellSouth Louisiana Brief as App. C-2, Vol. 22, Tab 186. The Commission has recently stated that restrictions analogous to those in Louisiana violate the Act and the Commission's binding regulations on the scope of resale. AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc.; the Mississippi Public Service Commission; and the Public Service Commissioners of the State of Mississippi, C.A. No. 3:97CV400WS (S.D. Miss.), Memorandum of the Federal Communications Commission as Amicus Curiae at 13-24 (filed Dec. 4, 1997). In its Local Competition Order, ¶ 948, the Commission specifically rejected any exemption from the resale obligation for "contract and other customer-specific pricing arrangements."

**B. BellSouth Has Failed to Institute Performance Measurements Needed to Ensure Consistent Wholesale Performance**

A conclusion that a market has been “fully and irreversibly opened to competition” requires both a demonstration that the competitive conditions currently in place will foster efficient competition, as well as assurances that those conditions will remain in place after a section 271 application has been granted. In terms of wholesale performance—where a BOC’s systems will be critical to enabling its competitors to succeed in the marketplace—an appropriate means of “benchmarking” performance is needed. As we have explained previously, we examine whether a BOC has established (1) performance measures and reporting requirements so that wholesale performance can be measured; (2) performance standards – *i.e.*, commitments made by the BOC to meet specified levels of performance (preferably backed up by liquidated damages clauses); and (3) performance benchmarks – *i.e.*, a track record of performance. These steps will permit an assessment of current performance and will enable competitors and regulators to more effectively address any post-entry “backsliding” from prior performance through contractual, regulatory, or antitrust remedies.

As described in our South Carolina Evaluation, at 45-48, BellSouth has failed to “provide[] sufficient performance measures in its evaluation to make a determination of parity or adequacy in the provision of resale or UNE products and services to CLECs.” *Friduss South Carolina Aff.* ¶ 78. BellSouth responds that several measurements the Department listed were

"included in the South Carolina filing, yet overlooked."<sup>61</sup> The Department did not overlook that data. The Department's Evaluation and the Friduss Affidavit make clear that they were focusing on BellSouth's permanent performance measures,<sup>62</sup> and the Department found--and confirmed in discussions with BellSouth--that BellSouth had not included these measurements as part of its permanent measurements. As the Department has repeatedly stated, one important purpose of performance measurements is to detect backsliding and thus facilitate meaningful post-entry oversight that ensures that the market opening is irreversible. Data such as BellSouth provided are important for evaluating BellSouth's support processes and determining whether they operate in a nondiscriminatory manner at the present time, but that present data cannot detect backsliding in the future. Future data is, of course, required for that purpose, and this necessitates an *ongoing* commitment to provide these performance measures.

In its current application, BellSouth has added some permanent performance measures, but major deficiencies remain.<sup>63</sup> Given BellSouth's lack of performance measures in a number of

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<sup>61</sup> Reply Affidavit of William N. Stacy ¶ 2, attached to Reply Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina, In re: Application of BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina, CC Docket 97-208 (Nov. 14, 1997) ("South Carolina Reply Brief") as App. Tab 8.

<sup>62</sup> The Department understands that BellSouth is committing to report only its permanent measurements on a regular, ongoing basis to CLECs and regulatory authorities.

<sup>63</sup> For example, BellSouth's list of permanent performance measurements still lacks complete, properly defined measurements for (1) Pre-order System Response Times--Five key functions, (2) Total Service Order Cycle Time, (3) Service Order Quality, (4) Speed of Answer--Ordering Center, (5) Average Service Provisioning Interval, (6) Percent Service Provisioned Out of Interval, (7) Port Availability, (8) Completed Order Accuracy, (9) Orders

crucial areas, we still are unable to determine whether BellSouth has established enforceable performance standards for these areas or a track record, or benchmark, of wholesale performance

As is true with our analysis of wholesale support generally, our insistence on performance benchmarks does not require any particular level of use in Louisiana. Appropriate benchmarks may be established through commercial performance elsewhere in the BellSouth region. In the event that a BOC is not able to set a benchmark through actual use – though we doubt that any region will not have some actual competitive entry – the Department would consider other means of ensuring adequate performance, including enforceable performance standards and other means of demonstrating wholesale capability, i.e., carrier-to-carrier testing, independent auditing, or internal testing. In this case, however, BellSouth has not yet instituted the necessary performance measures, adopted enforceable performance standards, or demonstrated a satisfactory performance benchmark (through actual use or otherwise). Thus, given our inability to conclude that the necessary protections against backsliding are in place, we cannot conclude that the market has been fully and irreversibly opened to competition.

**C. BellSouth's "Public Interest" Arguments Do Not Justify Approval of This Application**

BellSouth erroneously contends, as it did in South Carolina, that the benefits of allowing its entry now into the interLATA market in Louisiana warrant approval of this application under

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Held for Facilities, (10) Billing Accuracy, (11) Billing Completeness, (12) Operator Services Speed of Answer, (13) Directory Assistance Speed of Answer, and (14) 911 Database Update Timeliness and Accuracy. These measures, and their significance, are discussed in the Friduss South Carolina Affidavit.



the "public interest" standard. BellSouth and its economic experts significantly overvalue the benefits of the BOC's long distance entry now, and virtually ignore the benefits to be gained from opening BellSouth's local markets, as explained in the Supplemental Affidavit of Marius Schwartz.<sup>64</sup> Primarily, BellSouth and its experts reiterate here the mistaken or unsupported claims they made in South Carolina and that Prof. Schwartz has already refuted. To the extent they have offered any additional arguments in response to Prof. Schwartz, they have failed to present any credible evidence that would affect the validity of his conclusions. Indeed, only one of BellSouth's economic experts, Prof. Hausman, has even attempted to respond to Prof. Schwartz's Supplemental Affidavit in any detail.<sup>65</sup> His criticisms, which are addressed in detail in Appendix A to this Evaluation, are mistaken on a variety of grounds or simply unclear, and for all of the reasons discussed in Appendix A, the Commission should reject Prof. Hausman's arguments. In short, the Department adheres to its position that the "fully and irreversibly opened to competition" standard, as explained by Prof. Schwartz, continues to represent the best reconciliation of the competing benefits and risks associated with local and long distance markets in the section 271 entry process.

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<sup>64</sup> This affidavit is attached to this Evaluation as Ex. 2 ("Schwartz Supp. Aff.").

<sup>65</sup> Reply Declaration of Prof. Jerry A. Hausman attached to BellSouth South Carolina Reply Brief, CC Docket 97-208, as App. Tab 2

As explained in our South Carolina filing<sup>66</sup> and in the Schwartz Supplemental Affidavit, the Department's analysis and that of Prof. Schwartz, in contrast to that of Prof. Hausman and BellSouth, give full consideration to competitive effects in both the interLATA and the local markets. Accordingly, for the reasons explained in Prof. Schwartz's supplemental affidavit, the Department's entry standard, far from delaying competition, promotes it, more than would dependence on post-interLATA entry enforcement to compel the BOCs to open their local markets.<sup>67</sup> In short, our view is that as soon as, but not before, the preconditions of the 1996 Act are met and a BOC is willing and able to provide -- at appropriate prices -- what competitors require for entry at various scales of operation, using interconnected separate facilities, unbundled elements, and resale, section 271 authority should be granted. Because BellSouth has not made this necessary showing, it would not be in the public interest to grant its section 271 application for Louisiana.

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<sup>66</sup> DOJ South Carolina Evaluation at 48-50

<sup>67</sup> Schwartz Supp. Aff. ¶¶ 36-59.

#### IV. Conclusion

BellSouth has not taken all measures needed to ensure that local markets in Louisiana are fully and irreversibly open to competition, both because it has not satisfied the requirements of the competitive checklist as discussed in part II of this Evaluation, and for the additional reasons discussed in part III of this Evaluation. Therefore, BellSouth's application for in-region interLATA entry in Louisiana under section 271 of the Telecommunications Act should be denied

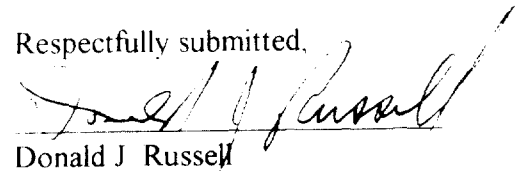
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December 10, 1997

# **EXHIBIT 4**

**Appendix A of  
Evaluation of the United States  
Department of Justice, In the  
Matter of Application of BellSouth  
Louisiana Pursuant to Section 271  
of the Telecommunications Act of  
1996 to Provide In-region,  
InterLATA Services in Louisiana,  
Docket No. 97-231  
(Dec. 10, 1997)**

## APPENDIX A

### RESPONSE TO PROF. HAUSMAN'S CRITICISMS OF PROF. SCHWARTZ'S ANALYSIS FOR THE DEPARTMENT

In its previous evaluations, as well as this one, the Department has relied on the Affidavit<sup>1</sup> and Supplemental Affidavit<sup>2</sup> of Prof. Marius Schwartz in support of its standard for evaluation and consideration of the public interest entry criterion of section 271 of the 1996 Act. The Supplemental Affidavit, and the Department's South Carolina Evaluation at 48-50 (attached to this Evaluation as Exhibit 5), address issues that other economic experts have raised regarding Prof. Schwartz's original analysis in his Affidavit, and explain why that analysis remains valid.

Only one of BellSouth's economic experts, Prof. Hausman, has attempted to respond to Prof. Schwartz's Supplemental Affidavit in any detail.<sup>3</sup> Most of his arguments have already been addressed by Prof. Schwartz and other experts, while others are simply unclear. For example, Prof. Hausman seems to think that Prof. Schwartz should change his position on the cost-benefit tradeoff of requiring local market opening before BOC interLATA entry in the wake of the Eighth

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<sup>1</sup> Affidavit of Marius Schwartz, ("Schwartz Aff"), attached to this Evaluation as Ex. 1.

<sup>2</sup> Supplemental Affidavit of Marius Schwartz, ("Schwartz Supp. Aff."), attached to this Evaluation as Ex. 2.

<sup>3</sup> Reply Declaration of Prof. Jerry A. Hausman ("Hausman South Carolina Reply Decl."), attached to Reply Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina, In re: Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208 (Nov. 14, 1997) ("BellSouth South Carolina Reply Brief") as App. Tab 2.

Circuit's recent decision on the Commission's local competition rules. But nothing in the Eighth Circuit's decision affects the validity of Prof. Schwartz's observation that prematurely granting BOC interLATA entry before the process of opening local markets is completed would likely encourage further delays that would "substantially impede the development of local competition." Schwartz Supp. Aff. ¶ 58. Not only would this create a clear harm to local consumers in the short term, but over the longer term, as Prof. Schwartz points out, "if local competition fails to develop exchange access alternatives, then BOC interLATA entry is likely, over time, to pose a growing threat to the ability of IXC's to compete, since IXC's' access needs will change over time and preventing discrimination in the establishment of new access arrangements is considerably harder than preventing the degradation of established arrangements." Schwartz Supp. Aff. ¶ 70 (citation omitted); see also id. ¶ 11.<sup>4</sup>

The more specific criticisms that Prof. Hausman directs at Prof. Schwartz's analysis are generally mistaken, and in a number of instances self-contradicting. For example:

- Prof. Hausman insists on the need to include consideration of elasticity of demand and changes in price, as well as market size, in the comparative market analysis,<sup>5</sup> yet

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<sup>4</sup> Prof. Hausman continues to characterize inaccurately what Prof. Schwartz has said about competitive effects in long distance markets. Compare Schwartz Supp. Aff. ¶ 70 n.22, with Hausman South Carolina Reply Decl. ¶ 6 & n.3, and Declaration of Jerry A. Hausman ¶ 41 ("Hausman Louisiana Decl."), attached to Brief in Support of Application by BellSouth for Provision of In-Region InterLATA Services in Louisiana, CC Docket No. 67-231 (Nov. 6, 1997) ("BellSouth Louisiana Brief") as App. A, Vol. 1, Tab 5, which Prof. Hausman has not changed from his submission in South Carolina.

<sup>5</sup> Hausman South Carolina Reply Decl. ¶ 31

nowhere in his own analysis does he consider such factors for any of the types of products and services included in the local markets served by the BOCs, apart from basic flat-rate residential local exchange service, the one type of local service that arguably is priced at or below cost.<sup>6</sup> Prof. Schwartz, in contrast, identified a number of BOC services, such as intraLATA toll, vertical services, ISDN and exchange access, that are over-priced and where competition is particularly likely to yield price benefits and increased output. And, as Prof. Schwartz has pointed out, competition will yield benefits in the provision even of currently subsidized services, as universal service subsidies are reformed on a competitively neutral basis and become available to all providers, not just incumbent LECs. Schwartz Supp. Aff. ¶ 23.<sup>7</sup>

- Both Prof. Schwartz and Prof. Hausman use the same long distance industry elasticity of demand of .7 in their evaluations of long distance markets.<sup>8</sup> Prof. Hausman

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<sup>6</sup> Hausman Louisiana Decl. ¶¶ 24-25.

<sup>7</sup> The Consumer Federation of America, in its reply comments on BellSouth's interLATA entry application in South Carolina, has actually compared in quantitative terms the potential benefits of greater competition in local and long distance markets, building on the analysis by Prof. Schwartz. The CFA has estimated that while excess profits that might be returned to consumers from greater competition in long distance markets amount to \$0-2 billion annually, excess profits that could be returned to consumers from greater competition in all local markets amount to \$8-12 billion annually. Reply Comments of the Consumer Federation of America, In re: Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of InRegion, InterLATA Service in South Carolina, CC Docket No. 97-208 at Table 1 and App. A (Nov. 14, 1997).

<sup>8</sup> Hausman Louisiana Decl. ¶¶ 14, 20.

inappropriately criticizes Prof. Schwartz for doing so,<sup>9</sup> arguing he should have used firm elasticity instead. But Prof. Schwartz has correctly used the industry elasticity figure for the specific purposes indicated in his affidavit, which were (a) to compute the effect on the amount of access revenues associated with the industry-wide price change assumed by Prof. Hausman, and (b) to refute Prof. Hausman's suggestion that firms such as BOCs in the long-distance industry would have no incentive to raise the industry-wide price levels if they could. Schwartz Supp. Aff. ¶¶ 65, 68-70, 72-74

- Prof. Hausman dismisses the potential price benefits from basic local exchange competition as "essentially zero" based on change in overall quantity of demand for a static product,<sup>10</sup> without considering the potential benefits consumers could realize from competition among firms, as well as other benefits from competition in the form of new products and improved service. He also simply assumes that because prices in local markets are regulated, there is nothing to be gained by introducing competition in them,<sup>11</sup> failing to address the well-recognized limitations of regulatory constraints compared with competitive ones that Prof. Schwartz identified, as well as the potential benefits of innovation. Schwartz Supp. Aff. ¶¶ 18-25. Prof. Hausman's views are at odds with the underlying premise of the Telecommunications Act that regulated monopoly is far inferior

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<sup>9</sup> Hausman South Carolina Reply Decl. ¶ 36

<sup>10</sup> Hausman Louisiana Decl. ¶ 25.

<sup>11</sup> Hausman South Carolina Reply Decl. ¶¶ 31-32; Hausman Louisiana Decl. ¶ 25.



to competition in ensuring that local telecommunications services are most efficiently provided to consumers. In fact, as indicated by Prof. Hausman's own analysis of long distance markets, a large share of the benefits to consumers from increased competition in telephone services reflects transfers to consumers derived from reductions in price, rather than simply increases in aggregate usage (though such increases would occur as well), and this can be expected to hold true for local services as well, so that Prof. Hausman's exclusive focus on industry elasticity of demand is inappropriate in evaluating costs and benefits in this context.

- Prof. Hausman continues to defend the "double marginalization" theory at the core of his analysis, while accusing Prof. Schwartz of misperceiving BOC incentives.<sup>12</sup> However, Prof. Schwartz was addressing BOC ability to reduce prices in the manner alleged, not incentives. As Prof. Schwartz points out, section 272(e)(3) of the 1996 Act requires that BOCs and their subsidiaries impute access charges, and "[t]his requirement would seem to restrict the BOCs' ability to behave in the manner stipulated by Professor Hausman and others." Schwartz Supp. Aff. ¶ 65. Prof. Hausman merely assumes that the statutory imputation requirements will be ineffective in affecting BOC behavior, yet he also assumes that BOC entry would be in compliance with the minimum requirements of the 1996 Act such as those in section 272.<sup>13</sup> At the same time, Prof. Hausman completely

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<sup>12</sup> Hausman South Carolina Reply Decl. ¶ 34.

<sup>13</sup> Hausman South Carolina Reply Decl. ¶ 34; Hausman Louisiana Decl. ¶¶ 25, 42.